Syed Afendy Ali bin Syed Abid Ali v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO MT WA-42(R)(A)-1–03 OF 2018
COLLIN SEQUERAH J
10 DECEMBER 2020

Criminal Law — Appeal — Appellant was convicted and sentenced for offences under s 165 of Penal Code — Whether appellant was a public servant — Appellant appealed against conviction and sentence — Whether respondent failed to prove ingredients of offence under s 165 of Penal Code — Whether appellant received gifts from person who had dealings or connection with functions of appellant department — Whether appellant accepted valuable thing without giving consideration or adequate consideration — Penal Code s 165

The appellant was charged in the sessions court for one offence under s 17 of the Malaysian Anti-Corruption Commission Act 2009 ('the MACC Act'); nine charges under s 165 of the Penal Code and nine charges under s 4(1) of the Anti-Money Laundering Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLATFAPUAA 2001'). At the end of the defence stage, the sessions court discharged and acquitted the appellant from the charge under s 17 of the MACC Act, one of the charges under s 165 of the Penal Code and all nine charges under the AMLATFAPUAA 2001. The appellant was convicted on eight charges under s 165 of the Penal Code and was sentenced to eight months imprisonment and a fine of RM10,000 for each charge. The appellant appealed against conviction and sentences. The appeal mainly centred on the respondent's failure to prove the ingredients of offence under s 165 of the Penal Code. The appellant disputed that he was a public servant. The appellant further contended that the person from whom the appellant had accepted the gifts was known to the appellant to have had dealings or connection with the official functions of his department. The other issues need to be determined was whether the appellant accepted a valuable thing for himself without giving consideration or adequate consideration. The respondent submitted that the appellant obtained for the appellant's family members a valuable thing the interest in the immovable properties as detailed in each charge for the offences under s 165 of the Penal Code. The appellant contended that as no memorandum of transfer nor deed of assignments were executed by the appellant nor were there any other instrument of transfer of ownership from DLSB to the appellant, it could be concluded that the alleged receipt or interest thereof in the said immovable properties had never occurred.

Held, allowing appeal and all fines paid to be refunded to the appellant:

(1) All encompassing scope of s 126 of the Local Government Act 1976 sufficiently disposed of the argument that the appellant was not a public servant. There was no merit in the argument raised that the appellant was not a public servant within the meaning of s 165 of the Penal Code (see para 48).

(2) It was found that the appellant was involved in some form of official relationship with Syarikat Danau Lumayan Sdn Bhd ('DLSB') in the appellant's capacity and position in DBKL. The particular ingredient was adequately proven by the respondent (see paras 56–57).

(3) The appellant and/or the respective purchasers could not also have been in a position to agree to accept or attempt to obtain such valuable thing or interest in such valuable thing unless and until such valuable thing was legally capable of being placed in their absolute possession. Even if it were contended that the appellant had agreed to accept such valuable thing, the requisite mens rea in s 165 of the Penal Code had to refer to the intention to accept or agree to accept a valuable thing or an interest in such valuable thing which was legally capable of being accepted did not yet materialise. The properties were as yet incapable of being transferred to the purchaser's name. It could not be said that was an agreement or an attempt to accept such valuable thing or such interest in such valuable thing (see paras 78–80).

(4) The court was of the considered view that as there was no definition of the phrase 'consideration' in the Penal Code or MACC Act, it was permissible to determine the meaning of the phrase with reference to the Contracts Act 1950 and the ordinary canons of construction relating to contractual law. It was clear that s 2 of the Contracts Act 1950 encompassed a promise to do or to abstain from doing something or in other word a promise to pay. There was nothing in the nature of the transactions to indicate that it was meant to be anything other than a normal sale of property transaction conducted between two parties at arm's length. These transactions were not meant to be a transfer of the properties to the named purchasers without consideration. The circumstances as a whole indicated that there was consideration in the executory form present in all the transactions (see paras 100, 102, 105, 113 & 115).

[Bahasa Malaysia summary

Perayu didakwa di mahkamah sesyen atas satu kesalahan di bawah s 17 Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 ('Akta SPRM'); sembilan pertuduhan di bawah s 165 Kanun Keseksaan dan sembilan pertuduhan di bawah s 4(1) Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan keganasan 2001 ('the AMLATFAPUAA 2001'). Selepas selesai bahagian pihak pembelaan, mahkamah sesyen melepaskan dan membebaskan

perayu dari tuduhan di bawah s 17 Akta SPRM, salah satu tuduhan di bawah s 165 Kanun Keseksaan dan kesemua sembilan tuduhan di bawah AMLATFAPUAA 2001. Perayu disabitkan atas lapan pertuduhan di bawah s 165 Kanun Keseksaan dan dijatuhkan hukuman penjara lapan bulan dan denda RM10,000 untuk setiap pertuduhan. Perayu mengemukakan rayuan terhadap sabitan dan hukuman. Rayuan tersebut berpaksikan pada kegagalan responden untuk membuktikan unsur kesalahan di bawah s 165 Kanun Keseksaan. Perayu mempertikaikan bahawa dia adalah pegawai awam. Perayu selanjutnya berpendapat bahawa perayu tahu bahawa individu yang mana perayu telah menerima pemberian itu bahawa dia mempunyai urusan atau hubungan dengan fungsi rasmi jabatannya. Isu lain yang perlu ditentukan ialah samada perayu menerima sesuatu yang berharga untuk dirinya sendiri tanpa memberikan pertimbangan atau pertimbangan yang mencukupi. Responden menyatakan bahawa perayu memperoleh untuk ahli keluarga perayu satu barangan yang sangat berharga iaitu hak terhadap hartanah tak alih seperti yang diperincikan dalam setiap pertuduhan atas kesalahan di bawah s 165 Kanun Keseksaan. Perayu berpendapat bahawa kerana tidak ada instrumen pindah milik atau perjanjian penyerahan hak yang ditandatangani oleh perayu atau tidak ada instrumen lain pemindahan hak milik dari DLSB kepada perayu, maka dapat disimpulkan bahawa tuduhan penerimaan atau kepentingannya dalam hartanah tak alih tersebut tidak pernah berlaku.

Diputuskan, membenarkan rayuan dan segala saman yang telah dibayar perlu dipulangkan kepada pemohon:

(1) Skop 126 Undang-Undang Pemerintahan Tempatan 1976 yang merangkumi semua adalah memadai untuk menentukan alasan bahawa perayu bukanlah penjawat awam. Tidak ada merit dalam hujah yang dikemukakan bahawa perayu bukan pegawai awam di bawah s 165 Kanun Keseksaan (lihat perenggan 48).

(2) Didapati bahawa perayu terlibat dalam beberapa bentuk hubungan rasmi dengan Syarikat Danau Lumayan Sdn Bhd ('DLSB') dalam kapasiti dan posisi perayu di DBKL. Elemen tersebut telah dibuktikan dengan tepat oleh responden (lihat perenggan 56–57).

(3) Perayu dan/atau pembeli yang berkenaan tidak mungkin berada dalam posisi untuk bersetuju untuk menerima atau percubaan untuk mendapatkan barang berharga atau minat terhadap barang berharga tersebut kecuali dan sehingga barang berharga tersebut secara sah dapat ditempatkan di pemilikan mutlak mereka. Sekalipun dikemukakan bahawa perayu telah bersetuju untuk menerima barang berharga itu, mens rea yang diperlukan dalam s 165 Kanun Keseksaan harus merujuk kepada niat untuk menerima atau setuju untuk menerima sesuatu yang berharga atau minat terhadap sesuatu yang berharga yang secara sah boleh diterima masih belum terwujud. Hartanah tersebut belum dapat

dipindahkan ke nama pembeli. Tidak dapat dikatakan bahawa itu adalah kesepakatan atau usaha untuk menerima perkara berharga atau kepentingan dalam manfaat barang berharga tersebut (lihat perenggan 78–80).

(4) Mahkamah berpendapat bahawa kerana tidak ada definisi frasa 'pertimbangan' dalam Kanun Keseksaan atau Akta SPRM, ia adalah dibenarkan untuk menentukan makna frasa tersebut dengan merujuk kepada Akta Kontrak 1950 dan prinsip yang biasa berkenaan konstruktif yang berkaitan undang-undang kontrak. Sudah jelas bahawa s 2 Akta Kontrak 1950 merangkumi janji untuk melakukan atau tidak melakukan sesuatu atau dengan kata lain janji untuk membayar. Tidak ada sifat dalam urus niaga tersebut yang menunjukkan bahawa urus niaga tersebut dibuat diluar norma untuk melakukan apa-apa selain daripada penjualan harta tanah yang biasa dilakukan antara dua pihak secara professional. Transaksi ini tidak dimaksudkan sebagai pemindahan hartanah kepada pembeli yang disebutkan tanpa pertimbangan. Keadaan secara keseluruhan menunjukkan bahawa ada pertimbangan dalam bentuk pelaksanaan yang ada dalam semua transaksi (lihat perenggan 100, 102, 105, 113 & 115).]

Cases referred to

Abu Bakar bin Seblie v PP [2012] 2 MLJ 842, HC (refd)
Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd [1996] 2 MLJ 12, FC (refd)
Currie v Misa (1875) LR 10 Exch 153 (refd)
Dunlop Pneumatic Type Co Ltd v Selfridge & Co Ltd [1915] AC 847, HL (refd)
Macon Works & Trading Sdn Bhd v Phang Hon Chin & Anor [1976] 2 MLJ 177; [1975] 1 LNS 93 (refd)
Mohd Khir bin Toyo v PP [2015] 5 MLJ 429; [2015] 8 CLJ 770, FC (refd)
R v Parks [1961] 3 All ER 633 (refd)
Tan Ong Ban v Teoh Kim Heng [2016] 3 MLJ 23, FC (refd)

Legislation referred to

Anti-Money Laundering Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 s 4(1)
Contracts Act 1950 s 2
Federal Capital Act 1960 ss 4, 5
Local Government Act 1976 s 126
Malaysian Anti-Corruption Commission Act 2009 ss 3, 17, 50(3), First Schedule
Penal Code s 165

Hamidi bin Mohd Noh (Syahrul & Hamidi) for the appellant.

Norzilati Izhani bt Zainal @ Zainol (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Collin Sequerah J:

INTRODUCTION

[1] The appellant was charged in the Sessions Court at Kuala Lumpur for the following offences:

(a) one charge under s 17 of the Malaysian Anti-Corruption Commission Act 2009 (MACC Act);

(b) nine charges under s 165 of the Penal Code; and

(c) nine charges under s 4(1) of the Anti-Money Laundering Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (AMLATFAPUAA 2001)

[2] At the end of the defence stage, the session court discharged and acquitted the appellant from the charge under s 17 of the MACC Act, one of the charges under s 165 of the Penal Code and all nine charges under s 4(1) of the AMLATFPUAA 2001.

[3] However, the appellant was convicted on eight charges under s 165 of the Penal Code and was sentenced to eight months imprisonment and a fine of RM10,000 for each charge, the sentences of imprisonment being ordered to run concurrently.

[4] The appellant now appeals to this court against both conviction and sentence only in respect of the offences for which he was convicted.

[5] These charges (English translation) relevant to this appeal are set out herein under as follows:

CASE NO 61R-037-09/2016

SECOND CHARGE (AMENDED)

That you, on the 6th of September 2013 at the Pejabat Pengarah Jabatan Perancangan Ekonomi & Penyelarasan Pembangunan (JPEPP), Dewan Bandaraya Kuala Lumpur (DBKL), in the Federal Territory of Kuala Lumpur, as a civil servant, that is the Pengarah Jabatan Perancangan Ekonomi & Penyelarasan Pembangunan (JPEPP) DBKL, had obtained for Minah bt Abdullah (NRIC No 430805-09-5052), a valuable thing, without consideration, to wit, an interest in an immovable property that is a condominium unit bearing the address at B-03-06, Astana Lumayan, Bandar Sri Permaisuri, Bandar Tun Razak, Kuala Lumpur valued at RM249,990.00 from Danau Lumayan Sdn Bhd whom you knew had a

connection with your official functions, and with that you have committed an offence that can be punished under section 165 of the Penal Code.

THIRD CHARGE (AMENDED)

That you on the 6th of September 2013 at the Pejabat Pengarah Jabatan Perancangan Ekonomi & Penyelarasan Pembangunan (JPEPP) Dewan Bandaraya Kuala Lumpur (DBKL), in the Federal Territory of Kuala Lumpur, as a civil servant, that is the Pengarah Jabatan Perancangan Ekonomi & Penyelarasan Pembangunan (JPEPP) DBKL, had obtained for Minah bt Abdullah (NRIC No 430805-09-5052), a valuable thing, without consideration, to wit, an interest in an immovable property that is a condominium unit bearing the address at B-08-04, Astana Lumayan, Bandar Sri Permaisuri, Bandar Tun Razak, Kuala Lumpur valued at RM249,990.00 from Danau Lumayan Sdn Bhd whom you knew had a connection with your official functions, and with that you have committed an offence that can be punished under section 165 of the Penal Code.

CASE NO 61R-038-0912016

FIRST CHARGE (AMENDED)

That you on the 30th of April 2014 at the Pejabat Pengarah Jabatan Perancangan Ekonomi & Penyelarasan Pembangunan (JPEPP) Dewan Bandaraya Kuala Lumpur (DBKL), in the Federal Territory of Kuala Lumpur, as a civil servant, that is the Pengarah Jabatan Perancangan Ekonomi & Penyelarasan Pembangunan (JPEPP) DBKL, had obtained for Mazwan Amin bin Mohd Noor (No KP 720225-10-6021), a valuable thing, without consideration, to wit, an interest in an immovable property that is a condominium unit bearing the address at A-19-03, Suasana Lumayan, Bandar Sri Permaisuri, Bandar Tun Razak, Kuala Lumpur valued at RM249,990.00 together with an upgrade package on the said unit valued at RM50,000.00 from Danau Lumayan Sdn Bhd whom you knew had a connection with your official functions, and with that you have committed an offence that can be punished under section 165 of the Penal Code.

SECOND CHARGE (AMENDED)

That you on the 30th of April 2014 at the Pejabat Pengarah Jabatan Perancangan Ekonomi & Penyelarasan Pembangunan (JPEPP) Dewan Bandaraya Kuala Lumpur (DBKL), in the Federal Territory of Kuala Lumpur as a civil servant, that is the Pengarah Jabatan Perancangan Ekonomi & Penyelarasan Pembangunan (JPEPP) DBKL, had obtained for Rodziah bt Abd Samad (NRIC No 620501-01-5858), a valuable thing, without consideration, to wit, an interest in an immovable property that is a condominium unit bearing the address at B-21-05, Suasana Lumayan, Bandar Sri Permaisuri, Bandar Tun Razak, Kuala Lumpur valued at RM249,990.00 together with an upgrade package on the said unit valued at RM97,000.00 from Danau Lumayan Sdn Bhd whom you knew had a connection with your official functions, and with that you have committed an offence that can be punished under section 165 of the Penal Code.

THIRD CHARGE (AMENDED)

That you on the 30th April 2014 at the Pejabat Pengarah Jabatan Perancangan Ekonomi & Penyelarasan Pembangunan (JPEPP) Dewan Bandaraya Kuala

Lumpur (DBKL), in the Federal Territory of Kuala Lumpur as a civil servant, that is the Pengarah Jabatan Perancangan Ekonomi & Penyelarasan Pembangunan (JPEPP) DBKL, had obtained for Syed Ashraf Ali bin Syed Afendy Ali (NRIC No 880919-14-5183), a valuable thing, without consideration, to wit, an interest in an immovable property that is a condominium unit bearing the address at C-23-01, Suasana Lumayan Bandar Sri Permaisuri, Bandar Tun Razak, Kuala Lumpur valued at RM249,990.00 together with an upgrade package on the said unit valued at RM150,000.00 from Danau Lumayan Sdn Bhd whom you knew had a connection with your official functions, and with that you have committed an offence that can be punished under section 165 of the Penal Code.

CASE NO 61R-039-0912016

FIRST CHARGE (AMENDED)

That you on the 30th of April 2014 at the Pejabat Pengarah Jabatan Perancangan Ekonomi & Penyelarasan Pembangunan (JPEPP) Dewan Bandaraya Kuala Lumpur (DBKL), in the Federal Territory of Kuala Lumpur as a civil servant, that is the Pengarah Jabatan Perancangan Ekonomi & Penyelarasan Pembangunan (JPEPP) DBKL, had obtained for Minah bt Abdullah (NRIC No 430805-09-5052), a valuable thing, without consideration, to wit, an interest in an immovable property that is a condominium unit bearing the address at D-19-07, Suasana Lumayan, Bandar Sri Permaisuri, Bandar Tun Razak, Kuala Lumpur valued at RM249,990.00 together with an upgrade package on the said unit valued at RM50,000.00 from Danau Lumayan Sdn Bhd whom you knew had a connection with your official functions, and with that you have committed an offence that can be punished under section 165 of the Penal Code.

SECOND CHARGE (AMENDED).

That you on the 16th of October 2014 at the Pejabat Pengarah Jabatan Perancangan Ekonomi & Penyelarasan Pembangunan (JPEPP) Dewan Bandaraya Kuala Lumpur (DBKL), in the Federal Territory of Kuala Lumpur as a civil servant, that is the Pengarah Jabatan Perancangan Ekonomi & Penyelarasan Pembangunan (JPEPP) DBKL, had obtained for Rodziah bt Abd Samad (NRIC No 620501-01-5858), a valuable thing, without consideration, to wit, an interest in an immovable property that is a condominium unit bearing the address at A-19-04, Suasana Lumayan, Bandar Sri Permaisuri, Bandar Tun Razak, Kuala Lumpur valued at RM249,990.00 together with an upgrade package on the said unit valued at RM50,000.00 from Danau Lumayan Sdn Bhd whom you knew had a connection with your official functions, and with that you have committed an offence that can be punished under section 165 of the Penal Code.

THIRD CHARGE (AMENDED)

That you on the 16th of October 2014 at the Pejabat Pengarah Jabatan Perancangan Ekonomi & Penyelarasan Pembangunan (JPEPP) Dewan Bandaraya Kuala Lumpur (DBKL), in the Federal Territory of Kuala Lumpur as a civil servant, that is the Pengarah Jabatan Perancangan Ekonomi & Penyelarasan Pembangunan (JPEPP) DBKL, had obtained for Syed Ashraf Ali bin Syed Afendy Ali (NRIC No 880919-14-5183), a valuable thing, without consideration, to wit, an interest in an immovable property that is a condominium unit bearing the address at D-19-08,

Suasana Lumayan Bandar Sri Permaisuri, Bandar Tun Razak, Kuala Lumpur valued at RM249,990.00 together with an upgrade package on the said unit valued at RM50,000.00 from Danau Lumayan Sdn Bhd whom you knew had a connection with your official functions, and with that you have committed an offence that can be punished under section 165 of the Penal Code.

BACKGROUND

[6] The prosecution case unveiled that the appellant was a civil servant who was initially appointed as an accountant in Dewan Bandaraya Kuala Lumpur (DBKL) commencing 1 July 1987.

[7] The appellant was later promoted to Grade W52 when appointed as Deputy Treasurer in the Finance Department (Jabatan Kewangan). He was then promoted to the position of Director in the Jabatan Perancangan Ekonomi dan Penyelarasan Pembangunan (JPEPP).

[8] Subsequently, the appellant was promoted to Grade JUSA C BU7 KUP in Jabatan Perancangan Ekonomi dan Penyelarasan Pembangunan and was further appointed as the Director at the Finance Department of DBKL also known as the City Treasurer (Bendahari Bandaraya).

[9] From 11 January 2016 until the time he was arrested by the Malaysian Anti-Corruption Commission, ('SPRM'), the appellant held the position as Executive Director (Project Management) in DBKL.

[10] The prosecution adduced evidence that Syarikat Danau Lumayan Sdn Bhd ('DLSB') was a company established in 1993 which main business was as a property developer. DLSB had three directors, namely, Dato' Sri Shaheen (SP11), Encik Ahmad Kamal Tun Ismail (SP30) and Dato' Sri Maznah Hamid, who is SP11's wife.

[11] DLSB entered into a joint venture agreement (P36) dated 22 September 2016 with DBKL to develop Bandar Tun Razak, Cheras, Kuala Lumpur. The type of property to be developed were commercial and residential properties.

[12] Amongst the projects to be developed by DLSB in Bandar Tun Razak include the Danau Lumayan Avenue Shop Lots, Astana Lumayan Condominiums and Suasana Lumayan Condominiums.

[13] The case for the prosecution further disclosed that the appellant had asked and thereafter obtained from DLSB one shop lot unit in Danau Lumayan Avenue, five condominium units in Astana Lumayan and six

condominium units in Suasana Lumayan for himself using the names of his family members for the purpose of making a profit once the said properties were re-sold to new purchasers at a higher price compared to the price agreed between the appellant and DLSB when executing the sale and purchase agreement.

[14] It is also the prosecution's case that the said units were obtained by the appellant without the need to pay a single cent to DLSB until he had obtained the profits from the proceeds of the sale of all the said units. It was alleged that this advantage and privilege was received by the appellant purely because of his position and post in DBKL.

[15] The prosecution also led evidence to show that the appellant had resold one unit of the shop lot in Danau Lumayan Avenue to a purchaser at a higher price.

[16] Thereafter, with the profits received from the sale of the said unit, the appellant had used part of it to purchase three of the five condominium units in Astana Lumayan as well as make several other payments before the balance of RM150,000 was kept in a current account belonging to the appellant and his wife.

[17] At the conclusion of the prosecution case, the sessions court held that the prosecution had succeeded in proving all ingredients in the charges comprising the subject matter of this appeal and accordingly ruled that a prima facie case had been made out against the appellant.

[18] In addition it was ruled that the presumption under s 50(3) of the MACC Act 2009 had arisen against the appellant.

[19] The appellant in his defence gave sworn evidence and called two other witnesses. The appellant confirmed that the last position held by him before his arrest was as Executive Director Management of Project Department (Pengarah Eksekutif Sahagian Pengurusan Projek) at the grade of JUSA B.

[20] The appellant denied that he had requested from Danau Lumayan Sdn Bhd (DSLB) for any condominium units and property which comprised the subject matter of the charges against him.

[21] According to the appellant, SP11 from DSLB had persuaded him to accept certain units without any payment. SP11 would then arrange for a loan

for the appellant based upon a 'Flexible Financing Scheme' offered by DSLB. The appellant would then only be required to pay the balance after deducting the amount of the approved loan. A

[22] The appellant then instructed Hidayanti (SP1) and Dato' Seri Shaheen Chugtal (SP11) to cancel the loan in the event he could not obtain the loan for himself. B

[23] However, SP1 and SP11 on behalf of DLSB failed to act upon those instructions. The appellant also said that he did not at any time receive any condominium units and properties as mentioned in the charges against him. C

[24] The appellant called Kamarul Zaman bin Mat Salleh (SD2) who testified that the rights over the properties only arose after payment was fully paid to the developers and after the developers had registered the name of the purchasers onto the strata title. D

[25] The appellant also testified that he did not have any official duties or obligations with DLSB but said that he merely supervised his subordinates who had official duties with DLSB. E

[26] The appellant alleged that the witnesses from DLSB, namely, Hidayanti (SP1), Dato' Seri Shaheen (SP11), Haslina bt Hashimi (SP5) and Ashikin bt Mohd Sharip (SP29) were not honest witnesses and had fabricated evidence against him. F

[27] The appellant said that this was because the directors of DLSB felt slighted by him as he was involved in the re-valuation of the properties in connection with DLSB's projects and this may have caused them to sustain losses. G

[28] The appellant further said that SP1 had lied because she was attracted to him but he had rejected her advances. He also said that she bore a grudge against him because he failed to help her (SP1's) husband when he faced disciplinary proceedings in DBKL. The appellant called SD3, Junainah bt Abdul Salam to corroborate this evidence. H

[29] The appellant said that he had succeeded in amassing wealth from early on. He said that he had utilised the scholarship monies for his university education as a down payment for his involvement in business and as investment and succeeded in raising the sum of RM1m by the age of 29. I

[30] The appellant thus, said that his wealth and properties were as a result of his own efforts and not through any illegal means. He said that his own fortune was sufficient for him in making payment for the properties which are the subject matter of the charges.

[31] The appellant said that he had no need to ask for properties from DLSB. The appellant had never made payments for the properties to DLSB as they had failed to serve notices to make payment.

[32] The appellant said that he was successful in life from the personal, academic and career perspectives.

[33] At the end of the defence case, the sessions court found that the defence raised was an afterthought and bare denial. The court found that the defence had failed to rebut the presumption under s 50(3) of the MACC Act 2009 and also failed to raise a reasonable doubt in the prosecution case and convicted him of all the charges.

THE APPEAL

[34] The appellant raised several issues in the course of his appeal. These are set out in the petition of appeal and also the written submissions of the appellant and it is unnecessary to reproduce them verbatim.

[35] The heart of the appellant's appeal, however, mainly centered around the respondent's failure to prove the ingredients of the offence under s 165 of the Penal Code.

The said section reads as follows:

> 165 Public servant obtaining any valuable thing, without consideration, from person concerned in any proceeding or business transacted by such public servant Whoever, being a public servant, accepts or obtains, or agrees to accept or attempts to obtain, for himself or for any other person, any valuable thing, without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted, or about to be transacted, by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both.

[36] The ingredients of the offence were set out in the case of *Abu Bakar bin Seblie v Public Prosecutor* [2012] 2 MLJ 842 where Ravinthran Paramaguru JC (as he then was) said:

The ingredients of an offence under s 165 are:

(a) that the appellant was a public servant at the material time;

(b) that the appellant accepted a valuable thing for himself without giving consideration or adequate consideration;

(c) that he gave no consideration for the valuable thing he obtained; and

(d) ... the person from whom the appellant had accepted the said gifts was known to the appellant to have had dealings or connection with the official function of his department.

[37] See also *Mohd Khir bin Toyo v Public Prosecutor* [2015] 5 MLJ 429; [2015] 8 CLJ 770.

[38] I propose to deal first with the issue raised by the appellant in respect of the first and the last ingredients of s 165 namely, that the appellant was a public servant and that the person from whom the appellant had accepted the said gifts was known to the appellant to have had dealings or connection with the official function of his department.

The appellant was a public servant

[39] The appellant disputed that he was a public servant at the material time. This contention was based upon the fact that the appellant's wages while he was employed by DBKL was paid by a corporate body and not by the government.

[40] The respondent on the other hand submitted that SP3 had stated that DBKL was established under the Federal Capital Act 1960 (Act 190) s 4 of which explains the establishment of the office of the Commissioner of the City of Kuala Lumpur as follows:

4 Appointment of Commissioner

(1) The municipal affairs of the City of Kuala Lumpur shall be administered by the Commissioner of the City of Kuala Lumpur.

(2) The Commissioner shall be appointed by the Yang di-Pertuan Agong for a term of five years or, if the Yang di-Pertuan Agong in any particular case so determines, for such shorter term as may be so determined.

[41] The appellant, however, submitted that according to s 5 of the Federal Capital Act 1960, the said Commissioner is a body corporate. Section 5 reads:

Commissioner to be a body corporate

A 5(1) The Commissioner shall be for all purposes a corporation sole under the name of 'Datuk Bandar Kuala Lumpur' or, in English, the 'Commissioner of the City of Kuala Lumpur'.

B **[42]** The appellant, therefore, submitted that as the said office is a body corporate, it is an independent entity and not dependent upon the government for its funding or administration.

C **[43]** Because the funding of the DBKL was not from government sources, it followed that the appellant, being an officer of DBKL, was therefore not a public servant.

D **[44]** As against this, the respondent submitted that according to SP3, in the year 2006, the position of Jawatan Timbalan Bendahari in the Jabatan Kewangan DBKL was created.

[45] In the year 2011, the position of Pengarah in the Jabatan Perancangan Ekonomi dan Penyelarasan Pembangunan (JPEPP) was created. In the year of 2015, the position of Pengarah Jabatan Kewangan in DBKL was created.

E

[46] The said positions were classified as civil servant positions. It was submitted that the authority for this were the provisions of s 126 of the Local Government Act 1976.

F

[47] Section 126 of the Local Government Act 1976 (LGA) reads:

126 Officers to be public servants

The Commissioner of the City of Kuala Lumpur, Mayor or President, Councillor, officers or employees of every description shall be deemed to be public servants within the meaning of the Penal Code [Act 574].

G

[48] I think that the all encompassing scope of s 126 of the LGA sufficiently disposes of the argument that the appellant was not a public servant. I therefore found no merit in the argument raised that the appellant was not a public servant within the meaning of s 165 of the Penal Code.

H

The person from whom the appellant had accepted the said gifts was known to the appellant to have had dealings or connection with the official function of his department

I

[49] It was submitted by learned counsel for the appellant that the appellant had given evidence that his official tasks in his capacity in the Department of Finance was merely to supervise his subordinates.

[50] It was submitted that the appellant stated that he had never been in personal contact with DLSB in an official capacity while serving in DBKL and said that such connections with DLSB were handled by his subordinates and not by him in person.

[51] It was also submitted that this fact was affirmed by SD3 who stated that there were in fact several officers in charge for external official matters on behalf of DBKL.

[52] The respondent on the other hand, referred to the evidence of SP1 and SP11 which were supported by documentary evidence tendered as exhibits as well as the evidence of SP6, SP12, SP14, SP15 and SP16 who were officers in DBKL who confirmed that DBKL had an official working relationship with the developer DLSB. This was further supported by the evidence of SP30 who was the Managing Director of DLSB.

[53] The respondent also referred to the joint venture agreement between DBKL and DLSB (exh P36) as well as the additional agreement between DBKL and DLSB (exh P37).

[54] The respondent submitted that these agreements directly showed that DLSB has a connection with the official functions of the appellant at the material time of allegedly obtaining these valuable things, to wit, the properties constituting the subject matter of the charges while holding the position as Pengarah in Jabatan Perancangan Ekonomi dan Penyelarasan Pembangunan (JPEPP) DBKL.

[55] The respondent also referred to the evidence of SP1 and SP11 regarding the Joint Project Management Committee ('JPMC') they attended and which was also attended by the appellant as well as documents such as the JPMC minutes of meeting (exhs P38, P39, P40 and P41) which showed that the appellant was involved in an official relationship between DBKL and DLSB.

[56] Having considered the evidence and the submissions, I find that the appellant was involved in some form of official relationship with DSLB in his capacity and position in DBKL.

[57] Under all the circumstances, therefore, I find that this particular ingredient was adequately proven by the respondent.

The appellant accepted a valuable thing for himself without giving consideration or adequate consideration

[58] An assessment of this particular ingredient involves a consideration of issues of a dual nature namely, that of accepting or obtaining a valuable thing and for accepting or obtaining the same without consideration.

[59] All the charges as framed by the respondent was that the appellant obtained a valuable thing, without consideration, to wit, an interest in an immovable property.

[60] The appellant's submission to the contrary was that the wordings of the charge in s 165 does not contain the phrase 'interest'.

[61] The question to be determined therefore is whether a 'valuable thing' can encompass an 'interest in an immovable property' within the meaning of Section 165 of the Penal Code?

[62] The respondent submitted that 'interest in an immovable property' falls under the definition of 'gratification' under s 3 of the Malaysian Anti-Corruption Commission Act 2009 ('the MACCA') which reads:

> 'gratification' means —
>
> (a) money, donation, gift, loan, fee, reward, valuable security, property or *interest in property being property of any description whether movable or immovable,* financial benefit, or any other similar advantage; (Emphasis added.)

[63] Section 165 of the Penal Code is listed as a 'prescribed offence' in the First Schedule of the MACCA according to para 3(a) thereof.

[64] Based on this, the respondent submitted that the appellant obtained for his family members a valuable thing, to wit, the interest in the immovable properties as detailed in each charge for the offences under s 165 of the Penal Code against the appellant.

[65] The submission of the appellant to the contrary was that as no memorandum of transfers nor deed of assignments were executed by the appellant nor were there any other instruments of transfer of ownership from DLSB to the appellant, it could be concluded that the alleged receipt or interest thereof in the said immovable properties had never occurred.

'Interest' in property

[66] While it is certainly possible, for the purposes of s 165, given the wide definition of 'gratification' in s 3 of the MACCA, for the acquisition of an 'interest' in property to qualify as a 'valuable thing', the question that needs to

be addressed is how is the nature of such 'interest' to be determined? A

[67] In other words, is the 'interest' to be determined in accordance with the dictionary definition or must it take the form of a legal or equitable interest?

[68] To answer this question in the context of this case, one must necessarily resort to the principles governing land law. This is pivotal because unless it is determined how and when property passes to a purchaser according to well defined principles of land law, it could not be held that the appellant had acquired any interest in the properties which were the subject matter of the charges. B C

[69] In this regard, I refer to the Federal Court case of *Tan Ong Ban v Teoh Kim Heng* [2016] 3 MLJ 23 which made reference to the pivotal decision in *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12 and helpfully cited by learned counsel for the appellant as follows: D

> OUR FINDING
>
> The principle of beneficial ownership
>
> [33] We will begin with an elucidation of the principle of beneficial ownership which we think is crucial to this case. *This principle of beneficial ownership was alluded to by Edgar Joseph JR in Borneo Housing Mortgage Finance Bhd where he observed:* E
>
> *... the contractual events which result in the vendor becoming a bare trustee of the land the subject matter of the agreement of sale and purchase for the purchaser, is on completion, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form, in favour of the purchaser, for it is then the vendor divest himself of his interest in the land.* (Emphasis added.) F
>
> [34] According to this principle, *when a purchaser of a property has performed his or her contractual obligation upon the full settlement of the purchase price besides executing all the formal documents to effect the registration of ownership, equity accords him or her with all the rights and privileges of a legal owner over the property. The purchaser thus enjoys the benefit of being the owner of the acquired property even though he or she has yet to become its registered owner.* G H
>
> [35] This is clearly demonstrated by the case of *J Raju v Kwong Yik Bank Bhd & Anor* [1994] 2 MLJ 408; [1994] 2 AMR 1220*, where the Supreme Court held that:*
>
> > *... the vendor of the land is only regarded as having divested himself of the beneficial interest in his land and vested it on the purchaser at the time when the purchase money had been paid in full.* I
>
> (see also *M & J Frozen Food Sdn Bhd and Peninsular Land Development Sdn Bhd v K Ahmad* [1970] 1 MLJ 149).
>
> [36] *The principle of beneficial ownership differentiate between the rights of a purchaser*

of a property who has fully settled the purchase price with one who has not. This principle clothes a purchaser who has settled the full purchase price with a distinct privilege equivalent to a legal owner, although he or she has yet to be registered as the proprietor of the property.

[37] *Under this principle of beneficial ownership, the vendor becomes a bare trustee for the purchaser in respect of the transacted property, while the purchaser assumes the position of beneficial owner having right in rem over the property. The purchaser is commonly accepted as having a beneficial interest in the land on the execution of the contract and upon which specific performance may be granted by the court. This beneficial interest is also sufficient to entitle the purchaser to enter a caveat under the NLC.*

[38] *On the other hand, a purchaser who has not settled the full purchase price does not enjoy such benefit.* The right of such purchaser is contractual in nature and in personam. He or she does not have any beneficial interest in the property. In the event of dispute, such purchaser can only institute action against the vendor with whom he or she has contracted. In other words, such purchaser merely enjoys a contractual right or a right in personam.

[39] *In short, a beneficial or equitable owner of a property stands in the same position as the legal owner in terms of enforcing proprietorship rights against the world at large. The only difference is that a beneficial owner is yet to be vested with the legal title.*

The application of the principle of beneficial ownership

[40] In the case before us, the High Court held that the principle of bare trust as enunciated in the case of Borneo Housing Mortgage Finance Bhd discussed above does not apply because the contract entered upon by the parties was in the statutory form as prescribed by the Act.

[41] With respect, we are of the view that the principle of beneficial ownership should apply equally to both negotiated contracts as well as statutorily formatted contract. We are of the considered view that there is no valid reason to distinguish between the two transactions.

[42] We agree with counsel for the first defendant that the intention of the Act as ell as the subsequent enactments and the subsidiary legislations is to merely protect the intending purchaser. It is not intended to abrogate or undermine the rights of purchaser under the common law or in equity. This is in line with the observation of the Privy Council in *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1988] 1 MLJ 69 (PC) stated:

> ... the Act of 1966 and the Rules were designed to improve and supplement common Jaw remedies and do not expressly or by implication deprive a litigant of a contractual remedy which is not dealt with under the Rules.

(see also *Raja Lob Sharuddin bin Raja Ahmad Terzali & Ors v Sri Seltra Sendirian Bhd* [2008] 2 MLJ 87; [2008] 2 AMR 357 (CA)).

[43] Therefore, on the authorities we agree with the first defendant that the principle of beneficial ownership applies equally to a contract in a statutory format as well as a negotiated contract.

The distinction between right ad rem or a right in personam and a right in rem? A

[44] In the present case it was a finding by the High Court that the first SPA is still valid and subsisting. The High Court did not accept the termination letter ('P14) on the ground that P14 was sent by Januari Properties Sdn Bhd, who was not a party to the first SPA. The High Court also opined that although the plaintiff had only paid RM5, 250, but, it was not the reason for such termination. B

[45] It was also the finding by the High Court that since the plaintiff has not fully paid the purchase price and that the strata title to the property is yet to be issued, the plaintiff has no beneficial interest over the property. Nevertheless, the High Court found that the plaintiff has acquired a legal right over the property since the first SPA is still valid and subsisting. C

[46] It is trite that in a transaction involving landed property, the principle under the law of contract will govern the sale transaction until registration of title is effected under the provision of the NLC. Lord Dunedin in the case of *Haji Abdul Rahman and another v Mahomed Hassan* [1917] AC 209 *held that:* D

> The agreement is valueless as a transfer or burdening instrument, but it is good as a contract.
>
> The Privy Council in this case explained that any transaction which was not done in accordance with the then existing law relating to registration of title conferred no real right to the land but merely a contractual right. E

[47] Raja Azlan Shah J (as His Lordship then was) following the Privy Council decisions in *Lake Yew v Port Swettenham Rubber Co Ltd* [1913] AC 491 and Haji Abdul Rahman and another took a similar stand in *Kersah La'usin v Sikin Menan* [1966] 2 MLJ 20 where he held that an unregistered transfer of land merely gives the purchaser a right which rests in contract. F

[48] Therefore, based on the ordinary sale and purchase transaction, the purchaser will acquire, a right ad rem or a right in personam. These rights will be conferred to the purchaser immediately after contracting parties entered into a contract for the sale and purchase of property. This was explained by Thomson J, in *Bachan Singh v Mahinder Kaur & Ors* [1956] 1 MLJ 97 in the following words: G

> ... the point is that when that contract was made the purchasers acquired a right ad rem and in personam to the land which so far as the vendor was concerned they were entitled to have erected into a real right. I am not prepared to say that that amounted to an equitable right. I prefer to regard it as a legal right of the nature of a chose in action. (Emphasis added.) H

[49] His Lordship further explained the difference between a right ad rem and a right in rem, as follows:

To my mind, many of the difficulties which appear to arise in these cases would not arise if we were to bear in mind throughout the distinction between rights ad rem or personal rights and rights in rem or real rights. Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires a right ad rem which is also a right in personam. In other words, he acquires a right to the land as against the vendor personally but not good against I

A the world as a whole and, in due course, that right can become a real right good against the world as a whole on registration in accordance with the Land Code (Emphasis added.)

(see also *Peninsular Land Development Sdn Bhd v K Ahmad* [1970] 1 MLJ 149; *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224; and *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45).

[50] Applying the above principle to the facts in the present case, we hold that the plaintiff is at best clothed with a right ad rem or a right in personam as against the second defendant upon the execution of the first SPA and payment of the sum of RM5,250 to the second defendant. The plaintiff's right rests solely in contract as against the second defendant and no cause of action could lie against the first defendant who is a complete stranger to the contract. We are supported in our view by what was said by Edgar Joseph JR in Borneo Housing Mortgage Finance Bhd that:

> *In our view, it is not a correct description of the relationship between parties to a contract of sale and purchase of land, … that from the time a contract of sale and purchase of land is concluded, the vendor is a trustee for the purchaser.* At that stage, they are only parties to a contract of sale and purchase of which a court may, in certain circumstances, decree specific performance. (Emphasis added.)

[70] It is clear from the above decision that a purchaser only acquires a beneficial interest in property upon full payment of the purchase price and the execution of the necessary documents sufficient to effect a valid transfer of property.

[71] Only then will the vendor acquire the status of a bare trustee and the purchaser acquire a right to validly lodge a caveat upon the property and the firm right to seek for specific performance of the contract of sale. All this is so notwithstanding, that the property is yet to be actually registered in the name of the purchaser.

[72] The law must be certain in as much as it must satisfy the ends of justice. Therefore, the principles espoused by the above decision compels me to the conclusion that the definition of what amounts to an 'interest' in the present context must be construed to be a legal or at the very least an equitable interest in the land and cannot refer to merely any loosely defined form of interest.

[73] The properties in the charges were condominium units. There was no evidence adduced that there were any strata titles issued yet in respect of these properties.

[74] To reiterate, according to established case law relating to land law and transfer of immoveable property transactions, such legal right would only accrue to a named purchaser in a sale and purchase agreement only upon full

payment of the purchase price and upon a duly executed transfer form or instrument of transfer which was necessary to effect a transfer of property, which in the circumstances of this particular case, would have been a deed of assignment.

[75] To put it another way, the requisite ingredient in s 165 relating to the appellant having received or agreeing to receive a valuable thing or an interest in such valuable thing had yet to crystallise.

[76] The receipt or agreement or attempt to receive such valuable thing or an interest in such valuable thing would only crystallise upon the appellant acquiring a legal interest or at least an equitable interest in the said properties which constituted the subject matter of the charges.

[77] In in order for this to happen, at the very least, the appellant would have had to pay the full purchase price and execute the necessary legal documents sufficient to vest ownership with the names purchasers in the sale and purchase agreements. Only then would DSLB acquire the status of a bare trustee. This, however, had yet to occur.

[78] In a similar context, the appellant and/or the respective purchasers thus could not also have been in a position to agree to accept or attempt to obtain such valuable thing or interest in such valuable thing unless and until such valuable thing was legally capable of being placed in their absolute possession.

[79] Even if it were contended that the appellant had agreed to accept such valuable thing, the requisite mens rea in s 165 has to refer to the intention to accept or agree to accept a valuable thing or an interest in such valuable thing which is legally capable of being accepted, which for the reasons stated, did not yet materialise.

[80] The properties were as yet incapable of being transferred to the purchaser's names. Therefore, it could not also be said that was an agreement or an attempt to accept such valuable thing or for that matter, such interest in such valuable thing.

[81] As learned counsel for the appellant submitted, the instant case is readily distinguishable from the case of *Mohamad Khir Toyo v Public Prosecutor* [2015] 5 MLJ 444 where the Federal Court held:

> His valuer valued the said land at RM5.5m. On 29 May 2007, he sold the said land to the appellant and wife at RM3. 5m, which was paid by two cheques. P33 and P34 were tile memorandum of transfers of the said land to the appellant and wife for RM3.5m.

[82] The above cited case also concerned a charge under s 165 of the Penal Code but that was a case where the appellant had obtained property for inadequate consideration.

[83] It is notable from the quoted portion of the case that there were memorandum of transfers of the said land executed. The full purchase price was also paid.

[84] The instant case, however, differs in the material aspect that no similar instrument of transfer was executed and no payment had yet to be made. It could not therefore be held that the appellant had acquired or obtained any 'interest' in these properties as yet.

[85] Any other interpretation would be anathema to the certainty required in legal jurisprudence that would endow the general public and all citizens with the knowledge so as to how to properly conduct their affairs in relation to such matters.

[86] In other words, the acquiring of such an 'interest' in the context of the term 'valuable thing' in s 165 of the Penal Code read together with the definition of 'gratification' in s 3 of the MACCA, cannot be loosely defined so as to encompass any form of vague or nebulous interest other than one that has its foundation in the firmly rooted principles of established law which in the present case is the law relating to the valid transfer of immoveable property.

[87] No such form of legal interest had yet arisen in this case that was capable of being accepted or for that matter, agreed to be accepted on the part of the appellant and the requisite ingredient, therefore, had not been proven.

CONSIDERATION

[88] The next issue to be considered concerns the ingredient of 'giving no consideration for the valuable thing obtained'. It is the foundation of the case for the respondent that the appellant obtained such valuable thing without giving any consideration. This is plainly evident from the manner in which the charges itself were worded.

[89] A consideration of this issue involves asking the question whether these transactions were meant to convey the properties described in the charges to the appellant without him or his family members having to pay any form of money or furnish any consideration?

[90] The evidence from the material prosecution witnesses disclosed that DSLB did not take any steps to terminate the sale and purchase agreements at the time because of the position the appellant occupied in DBKL.

[91] They said that if it were any other purchaser, the sale and purchase agreements would have been promptly terminated once the period for the scheduled payments had passed and there would have been no indulgence granted to these purchasers as was granted to the appellant.

[92] As against this, however, is the evidence from the defence that the appellant had asked SP11 to arrange for some form of a flexible financing scheme and when this failed to materialise, had instructed that the transactions be terminated.

[93] This was in fact put to the prosecution witnesses during their case and merits careful consideration. SP11 did not deny such instruction had been issued but merely said that it was not conveyed to him.

[94] Another pertinent question to be considered is whether these transactions would have eventually materialised had the appellant failed to comply with the scheme of payment in the sale and purchase agreements?

[95] What transpired in fact was that all the agreements were eventually terminated by DLSB, obviously for failure to comply with the payment requirements and schedule, albeit after the conviction of the appellant at the sessions court, such evidence being admitted upon an application made by the appellant. This bore all the hallmarks attendant upon a normal sale and purchase of property transaction.

[96] The said further evidence was admitted pursuant to a notice of motion filed by the appellant to admit further and fresh evidence and after having deliberated on the matter upon hearing submissions from both parties and determining that the applicant/appellant had fulfilled all the requirements as laid out in the case of *R v Parks* [1961] 3 All ER 633.

[97] Apart from the evidence emanating from the prosecution case as alluded to above, there is no evidence to suggest that the appellant or his family members were to acquire these properties for no consideration at all or for that matter for inadequate consideration.

[98] It is of course not in dispute that up to the time the appellant was charged, not a single cent had been advanced towards the purchase price but might this not have been a premature circumstance?

[99] Learned counsel for the appellant quite correctly pointed out that according to ordinary contractual principles, consideration cannot only be past or present but also future ie a promise to pay in future, which would render the consideration executory in nature.

[100] I am of the considered view that as there is no definition of the phrase 'consideration' in the Penal Code or the MACCA, it is permissible to determine the meaning of the phrase with reference to the Contracts Act 1950 and the ordinary canons of construction relating to contractual law.

[101] Section 2 of the Contracts Act 1950 describes 'consideration' as follows:

(a) ...

(b) ...

(c) ...

(d) when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or *promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;* (Emphasis added.)

[102] It is clear, therefore, that the above definition does encompass a promise to do or to abstain from doing something or in other words 'a promise to pay'.

[103] Learned counsel for the appellant drove home the point quite well when he referred to the case of *Macon Works & Trading Sdn Bhd v Phang Hon Chin & Anor* [1976] 2 MLJ 177; [1975] 1 LNS 93 where the classic definition of what amounts to consideration in *Currie v Misa* (1875) LR 10 Exch 153 and *Dunlop Pneumatic Type Co Ltd v Selfridge & Co Ltd* [1915] AC 847 was adopted as follows:

> The classic statement about what is consideration is that contained in *Currie v Misa* [1875] LR 10 Ex. 153 that valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.' An alternative approach is to define consideration in terms of purchase and sale, the consideration being the price of the promise.
>
> This is the view put forward by Sir Frederick Pollock which definition was approved by the House of *Lords in Dunlop Pneumatic Tyre Co, Ltd v Selfridge & Co Ltd* [1915] AC 847 as follows:
>
> > *An act of forbearance of the one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.* (Emphasis added)

[104] It is beyond question then that a promise to pay in the future or what can alternatively be described as executory consideration is a concept well known in contract law.

[105] Given the above, there was nothing in the nature of these transactions to indicate that it was meant to be anything other than a normal sale of property transaction conducted between two parties at arm's length.

[106] All the sale and purchase agreements executed contained a schedule of payments which also contained prescribed sanctions, penalties and consequences for non-payment as would attend any other normal transactions of a similar nature.

[107] This was clearly evident from cll 9 and 10 of the sale and purchase agreements.

[108] There was in evidence also a set of statement of accounts for which interest was payable which tended to show that these transactions were not meant to be anything out of the ordinary.

[109] Learned counsel for the appellant further referred to the testimony of SP11 as follows:

> Berdasarkan statement of account dan resit ini setuju dengan saya pembayaran yang telah dibuat dicampur dengan hutang outstanding balance untuk IDD52(C) dan dicampur dengan hutang untuk IDD52(C) menunjukkan bahawa pembelian rumah ini adalah berdasarkan a fair and reasonable consideration?
>
> a. Betul

[110] The circumstances as a whole would, therefore, suggest that while some indulgence might have been accorded the appellant in terms of the time frame in which payment was to be made, there was nothing to indicate that he or his family members who executed the sale and purchase agreements were to acquire the properties free of charge.

[111] What in fact had happened at the time the appellant was charged was that not a single cent had been yet paid. However, there was also no transfer of these properties to the purchasers free of charge nor indeed was there anything to suggest that a discounted rate was to be given.

[112] What cannot be ignored in this whole analysis is that no deed of assignment to transfer these properties in the names of the purchasers without

any form of consideration was ever executed and eventually all these transactions were aborted when DSLB took the step of terminating the sale and purchase agreements.

[113] The eventual outcome of the above analysis is that these transactions were not meant to be a transfer of the properties to the named purchasers without consideration.

[114] The prosecution case must stand or fall on the charges they deemed fit to institute.

[115] The circumstances as a whole indicated that there was, therefore, consideration in its executory form present in all these transactions.

[116] From a consideration of the circumstances as a whole, the ingredient of receiving or attempting to receive an interest in these immoveable properties without consideration was not proven by the prosecution.

[117] While it is acknowledged that the avowed legislative intention behind enacting s 165 of the Penal Code would have been to strike at the mischief of public servants taking advantage of the special relationship to profit from such a position, it certainly could not have been intended to make criminal such transactions at an arm's length basis and where such a transaction would not have differed from any similar transaction outside of the confines of such relationship.

[118] In this respect I refer to learned counsel for the appellant's reference to *Rattanlal & Dhirajlal* Chap IX Ms 774 which stated;

> This section does not prohibit a sale or purchase by a public servant, as a fair price, to or from a person transacting business before him.

[119] To further drive home the point, I also refer to the excerpt from 'The Penal Law of India' by Dr Sir Hari Singh Gour (11th Ed (updated) Vol II, 2006) at p 1551 and para 9, helpfully also cited by learned counsel for the appellant as follows:

> 'Any valuable thing'. The question whether a thing was or was not of values does not depend upon its market price.
>
> ... the question of consideration is also material, for it also tends to rebut the suspicion that otherwise attaches to a transaction, which may be inexplicable, otherwise than as a veiled gratification. *A thing how much so ever valuable, may be purchased for its full value by a public servant no less than by anybody else.* (Emphasis added.)

[120] It can, therefore, also be concluded that the offence under s 165 was designed to criminalise a public servant obtaining a valuable thing, which can include an interest in such valuable thing, such interest being of a legal or equitable nature, for no consideration or for inadequate consideration and the person from whom the public servant had accepted the said gifts was known to the public servant to have had dealings or connection with the official function of his department.

[121] See for example, the case of *Mohamad Khir Toyo v Public Prosecutor.*

Evidence relating to the purchase of Unit E43 of Danau Lumayan Avenue

[122] The respondent alluded in their submission to the purchase relating to the E43 Unit of Danau Lumayan Avenue in respect of a charge where the appellant was acquitted and where no appeal had been filed.

[123] This was undoubtedly for the purposes of drawing an inference against the appellant in respect of charges related to the current appeal. In light of the fact that the appellant was acquitted of that charge, however, no appeal having been filed, it would result in unfairness and prejudice against the appellant to refer to that transaction in order to draw any inference in the current appeals.

[124] I have, therefore, declined to take into consideration such evidence in the determination of this appeal.

DECISION

[125] In the circumstances, the learned sessions court judge, with respect, had erred in holding that the prosecution had made out a prima facie case against the appellant on all the charges.

[126] The prosecution had not successfully proven all the necessary ingredients of the charges under s 165 of the Penal Code. The appellant's defence ought not to have been called on all the charges.

[127] Under all the circumstances as well, the learned sessions judge had erred in holding that s 50(3) of the MACC Act 2009 which deals with the presumption of law that when any property has been proved to be obtained by an accused without any consideration or with an inadequate consideration, the accused will be presumed to have obtained the immovable properties with knowledge unless it can be proved otherwise, had arisen against the appellant.

[128] The learned sessions court judge, therefore, had made an appealable error which merits this court allowing the appeal of the appellant in respect of all the charges under s 165 of the Penal Code.

[129] This appeal is hereby, allowed in respect of all the charges and any fines already paid to be refunded to the appellant.

Appeal allowed and all fines paid to be refunded to the appellant.

Reported by Mohd Kamarul Anwar